No. 24-1685

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LEGAL AND POLICY CENTER
and
OIL AND GAS WORKERS ASSOCIATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the Securities & Exchange Commission

PETITIONERS' FINAL REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Petitioners make the following disclosures:

The National Legal and Policy Center has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Oil and Gas Workers Association has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The Securities and Exchange Commission's response underscores its unprecedented assertion of authority to promulgate regulations with little connection to material financial risk—but obvious connections to an ongoing policy debate about climate change. As predicted, all the SEC can summon to support this novel authority are the most general of statutory terms, vague references to "public interest" and "investor protection." These do not provide clear congressional authorization to require novel climate disclosures that are nothing like the existing disclosures about material financial issues required by law.

Rather than point to proper authority, SEC repeats the rules and explanations it has already provided, again sprinkling references to "materiality" throughout those explanations. But even many of the new required disclosures that refer to materiality depart from the SEC's longstanding focus: material financial risks. For instance, the Rule compels companies to say whether their board or management oversees or assesses "material" climate-related risks, but the focus of this disclosure is not on those risks: it is transparently an effort to out companies that the SEC believes are insufficiently dedicated to climate issues. And other disclosures drop even the fig leaf of materiality: the only possible reason to require disclosure of progress toward a climate goal is to name and shame companies without such a goal. The new disclosures are all of the same ilk, which is driven home by the fact that existing required disclosures already involved companies' material financial risks. SEC never explains how these additional disclosures could be statutorily authorized, yet new, if companies already must disclose material risks. Nor does SEC provide any limiting principle on its own authority based on its reading. Indeed, that reading would seemingly sanction the Rule as initially proposed—with hardly any materiality limitations at all.

SEC's effort to avoid the major questions doctrine is especially flimsy. It repeats its reliance on vague statutory terms that Congress itself has considered inadequate to authorize similar disclosures. The SEC cannot point to any historical analogues for these disclosures—hyper-focused on a specific policy issue—and its contention that these disclosures involve no significant political or economic consequences is belied by the thousands of comments on the proposed Rule. And the SEC has no special competence in assessing climate change and its relationship with weather events, emissions, or collective targets. Thus, SEC must—but cannot—show clear statutory authorization for the Rule.

Last, the Rule violates the First Amendment because it compels speech that is not purely factual *and* is controversial. The SEC tries to carve out vast new regulatory areas from constitutional oversight, asserting that "conclusions" and "inferences" from facts receive diminished protection, too. The First Amendment protects speakers against compelled statements of both opinions and facts. None of the disclosures mandated here are the types of balance-sheet material that might justify reduced scrutiny. And no matter the scrutiny, this Rule fails because companies are already required to disclose material financial risks—as the SEC does not seem to dispute.

In sum, SEC's new regulations go beyond its statutory authority. In its haste to take sides on climate policy, SEC has also trampled First Amendment rights. Rather than let a government agency—especially one with no purview over climate issues—direct an ongoing national policy debate by compelled speech, the Court should vacate the Disclosure Rule.

ARGUMENT

I. The Securities Act and the Exchange Act do not authorize the Disclosure Rule.

The SEC cannot point to any statutory provision that clearly authorizes the unprecedented disclosures that its new Rule requires. Instead, the SEC relies on general language in statutes otherwise geared toward core financial disclosures. Yet it offers no limiting principles on its use of that general language, instead asserting a limitless "authority to require disclosure of information" that some investors might desire. SEC Br. 26. If the SEC's reading is right, there is likely no disclosure beyond the SEC's power. The SEC's failure to articulate a coherent scope of its statutory authority underscores the failure of its reading. That reading is contradicted by the statutory text and context, particularly in light of the major questions doctrine.

A. The Acts do not authorize the Rule's disclosures.

As anticipated, the SEC invokes only generalized statutory language to support the authority it asserts here. According to the SEC, "Congress expressly delegated to the Commission authority to require disclosure of not only certain enumerated information, but also 'such other information' as the Commission determines to be 'necessary or appropriate in the public interest or for the protection of investors.'" SEC Br. 23 (quoting 15 U.S.C. §§ 77g(a)(1),§ 78*l*(b)(1)); *see* SEC Br. 27–28. But even the SEC quickly backtracks from reading those broad provisions to give it unlimited power, acknowledging that the "content and meaning" of these terms is narrowed by context and purpose. SEC Br. 29. As the SEC's own case explains, "'public interest' is never an unbounded term," and "a vague 'public interest' standard cannot be interpreted without some confining principle." *Bus. Roundtable v. SEC*, 905 F.2d 406, 413–14 (D.C. Cir. 1990).

Yet here the SEC makes "no attempt to limit the concept by reference to the concrete purposes of any section." *Id.* at 412. Instead, it says broadly that the securities laws aim to "provid[e] investors with information important to their investment and voting decision." SEC Br. 29. But that provides no confining principle either, for some investors may be interested in *every* aspect of a corporation's workings (and views). Trying again, the SEC describes its authority as extending to any "factors that may *affect* the issuer's finances." SEC Br. 49. Again, that is no limitation at all, for it is hard to conceive of a company action that could not "affect" its finances.

When the SEC finally gets around to addressing the specific statutory provisions it relies on, it fails to show that the Rule's disclosures are analogous to any of the statutory disclosures. Start with Section 7(a) of the Securities Act, which requires specified information from Schedule A—items like capitalization, outstanding debts, and a balance sheet. *See* 15 U.S.C. § 77g(a)(1); *id.,* § 77aa. The SEC points to historical additions that the executive branch has made to these requirements, such as material litigation. SEC Br. 32. But the SEC never articulates how the Rule's disclosures are akin to any of these narrowly tailored categories of information. Nor does it respond to the legislative understanding in the original House report, which summarized the statutory disclosures as the "essential facts concerning the property in which [the investor] is invited to acquire an interest," "indispensable to any accurate judgment upon the value of the security." H.R. Rep No. 73-85, at 3, 18–19 (1933). No one could contend that requiring, for instance, higher speculative GHG emissions estimates, or disclosures of which corporate entities are managing climate risks, are similarly "indispensable" information.

For its other primary supposed fount of authority, the SEC invokes Section 12 of the Exchange Act, which generally makes it illegal to trade a security on an exchange unless it is registered. 15 U.S.C. § 78*l*. Registration requires a company to file an application with basic information, such as organizational structure, rights of shareholders, terms on the securities, company officials with 10% more of stock, executive compensation, and bonuses. *See id.* § 78*l*(b). Though the SEC quotes this provision as supposedly authorizing it to require disclosures that it determines are broadly "in the public interest or for the protection of investors," SEC Br. 27, the provision in context more narrowly permits the SEC to require such disclosures "in respect of the" statutorily listed categories. 15 U.S.C. § 78*l*(b)(1).

The statute confirms the point in subsection (c), which authorizes the SEC to create exemptions to the required disclosures and to "require in lieu thereof the submission of such other *information of comparable character* as it may deem applicable to such class of issuers." 15 U.S.C. § 78*l*(c) (emphasis added).

Though the SEC cites the House Report for the Exchange Act for a generalized point about "inadequate corporate reporting," SEC Br. 30, it ignores that report's explanation that the Act expressly "singles out these problems as matters appropriate to be subject to restrictive rules and regulations," "leav[ing] to the administrative agencies" only "the determination of the most appropriate *form* of rule or regulation to be enforced." H.R. Rep. No. 73-1383, at 6 (1934) (emphasis added). The Act does not "giv[e] the Commission unconfined authority to elicit any information whatsoever." *Id.* at 23.

Once again, the SEC does not claim that the Rule's disclosures naturally fit within any of the Exchange Act's statutory categories, or even that they generally resemble those categories. Though SEC points to historical disclosures about "the general character of the business," SEC Br. 33, it points to no analogous disclosure for those in this Rule. And though the SEC cites its own 1934 rulemaking explanation, that explanation expressly "warned" corporations "against burdening their statements with highly technical details which would be of little or no use to investors." SEC Release Notice, Release No. 66, 1934 WL 28615 (Dec. 21, 1934) (cited by SEC Br. 33). And it explained that "corporations which are adhering to high standards of financial reporting will find it unnecessary to make anything but minor changes in their accounting practices as a result of the new requirements." *Id.* at *3. According to the SEC's 1934 explanation, "the regulations call for no information which the great majority of corporations will have any hesitation in disclosing to the general public." *Id.* That is obviously untrue of these disclosures, underscoring the differences between the narrow categories of information covered by the Exchange Act and the disclosures here.

The SEC next walks through various disclosures it required in the 1970s and 1980s, SEC Br. 33–36, but the agency does not claim that those disclosures are somehow pertinent to the scope of the original statutory authority. Nor does it claim that any of those disclosures are closely analogous to the Rule's disclosures. To the contrary, those disclosures underscore the novel nature of this Rule. For instance, disclosing material litigation "under environmental laws" (SEC Br. 35) is nothing like disclosing which corporate entities deal with climate issues and what a company's emissions goals are.

Turning to the SEC's purported specific justifications for each of the Rule's disclosures, those justifications each simply resort to a broad invocation of the "public interest," without the critical connection to the limited authority conveyed by the Acts. The SEC says that "Item 1502 (Strategy) requires issuers to disclose any climate-related risks that the issuer has determined have already had, or are reasonably likely to have, a material impact on the issuer's strategy, results of operations, or financial condition." SEC Br. 36. But any material risks already had to be disclosed under the existing regime. And the SEC never explains what the "materiality" of elements like "strategy"—separate from "financial condition"—means, or how companies are to assess it. "[T]raditional notions of materiality" (SEC Br. 42) have no purchase here. So whatever this disclosure involves, it does not fit within the statutory categories under the Acts.

Next, the SEC says that Item 1501 requires "issuers whose board of directors oversee climate-related risks and/or whose management plays a role in assessing and managing any material climate-related risks" "to disclose that oversight." SEC Br. 37. But again, the SEC cannot point to any analogous disclosure required by statute of a company's internal allocation of decision-making authority—or explain why that decision is necessarily material. Same for Items 1503 and 1504, requiring "issuers that use processes for identifying and managing any material climate-related risks to disclose those processes" and "issues that have climate-related targets or goals to disclose them" (SEC Br. 37): the SEC does not explain how mandatory disclosure of those processes and goals (rather than the material risks themselves) falls within its statutory authority. The point of both these required disclosures is transparently to shame companies that some believe are insufficiently dedicated to climate issues. But no statutory authority lets the SEC regulate on that basis.

Last, the Rule's required disclosure regarding GHG emissions makes sense only as a way to out companies for their emissions. If such emissions gave rise to material "transition risk," as the SEC claims (SEC Br. 40), companies would already disclose those material risks. The point of specific emissions disclosures—the arbitrariness of which is underscored by the Rule's concession that companies may use "reasonable estimates" (89 Fed. Reg. 21,668, 21,917 (Mar. 28, 2024))—is nothing like the categories of statutory disclosures. Instead, the point is to force "disclosure about the company's effects on the environment"—a goal that even the SEC concedes it "could not" pursue. SEC Br. 43, 45.

Because the Rule's disclosures do not fit within the statutory authority of the Acts, as understood by their text, context, and history, they are in excess of authority and unlawful.

B. The major questions doctrine confirms that Congress did not authorize SEC to promulgate a Rule with vast political and economic implications.

Even if the statutes' plain meaning did not foreclose the Disclosure Rule, the Rule would still exceed the SEC's authority under the major questions doctrine, by which courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). For reasons similar to those explained above, the Acts contain no *clear* statement authorizing SEC to adopt its wide-ranging climate change Disclosure Rule, so that Rule is unlawful.

The SEC does not dispute that many of the triggering conditions for the major questions doctrine are present here. It does not dispute that the Rule at a minimum imposes significant economic consequences. *See* 89 Fed. Reg. at 21,906 (Table 6). Though the SEC passingly disputes whether the Rule is politically controversial, its bald assertion that it "is not controversial" (SEC Br. 57) is difficult to credit given the thousands of comments (and many petitions for review) here. SEC embraces rather than disputes its reliance on "vague terms" "in a long-extant statute."

West Virginia v. EPA, 597 U.S. 697, 723–24 (2022). It acknowledges that it had previously decided "not to require disclosure regarding the environmental effects of corporate activities." SEC Br. 44. Thus, the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia*, 597 U.S. at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

The SEC's few arguments against the major questions doctrine's applicability are unavailing. Though the SEC says it "did not rely on 'vague'" "statutory language," SEC Br. 54, it does not—and could not—argue that references to "the public interest" are not vague. Instead, the SEC says it "invoked core provisions." SEC Br. 55. But that does not address the vague nature of these provisions, and it is dubious anyway: the "core provisions" the SEC invokes are generally tucked away as catch-all phrases at the end of disclosure categories that Congress specified. *See* 15 U.S.C. §§ 77g(a)(1), 78*l*(b)(1).

Next, the SEC's assertion that the Rule is "consistent with [its] longstanding administration" (SEC Br. 55) is no more convincing in the major questions garb than it was in the statutory authority garb: SEC still identifies no similar regulations of other issues. The Rule "adopts an entirely new subpart of Regulation S-K and an entirely new article of Regulation S-X for one topic—climate change—applicable to all public companies," thereby "elevat[ing] climate above nearly all other issues facing public companies." App. 711, Commissioner Mark T. Uyeda*, A Climate Regulation under the Commission's Seal: Dissenting Statement on The Enhancement and Standardization of Climate-Related Disclosures for Investors*, https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-mandatory-climate-risk-disclosures-030624 (Mar. 6, 2024).

Further, as in other major questions cases, "the Government's read of [the statute] would give [it] a breathtaking amount of authority," such that "[i]t is hard to see what measures this interpretation would place outside the [SEC's] reach." *Ala. Ass'n*, 594 U.S. at 764–65. Though the SEC suggests that it has "identified" a "limit" on its "reach," SEC Br. 55, it does not articulate that limit—"beyond the requirement that the [SEC] deem [the] measure" in the "public interest." *Ala. Ass'n*, 594 U.S. at 765,

766. That is hardly a limit. *See id.* (rejecting a similar "limit" of any measure deemed "necessary" by the agency).

The SEC also claims that it is not regulating "outside its wheelhouse." SEC Br. 56 (quoting *Biden v. Nebraska*, 143 S. Ct. 2355, 2382 (2023) (Barrett, J., concurring)). But the SEC says that the foundation for its disclosures is, for instance, that "an issuer's GHG emissions are a 'central measure and indicator of [its] exposure to transition risk.'" SEC Br. 40 (quoting 89 Fed. Reg. at 21,732). The Rule's disclosures are all premised on similar scientific, policy, and economic assumptions far outside the SEC's bailiwick: the causes of climate change; the likely responses of policymakers; the effects of individual corporate changes on climate change; and the reasons for investor interest in climate change disclosures. The Rule implicitly "place[s] extensive reliance on [scientific] judgments and the views of [some in the climate change] community in concluding that" climate issues must always be disclosed. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). But the SEC lacks expertise in those underlying issues. "The question" before this Court "is not how to respond to" climate change, "but who holds the power to do so." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring). The SEC does not hold that power.

The SEC argues that Congress has not rejected similar bills because prior bills "would have *required* the [SEC] to adopt disclosure rules . . . without regard to materiality." SEC Br. 56. But that hardly makes this Rule much different; after all, the SEC's own proposed rule likewise lacked putative materiality limitations, and the SEC does not suggest that its proposed rule is unrelated to the final rule. Plus, the earlier bills contained sprinkled references to materiality, just like this Rule. *See, e.g.*, H.R. 3623, 116th Cong. (2019) (finding that "the disclosure of information" "should" "identify, and evaluate" "material physical and transition risks posed by climate change" and "detail any board-level oversight of material climate related risks"). That some bills would have mandated additional disclosures (SEC Br. 57) hardly affects the core point: Congress itself has believed legislative action was necessary to implement disclosures like those in the Rule. And when it has wanted to mandate similar disclosures about specific policy issues, it has enacted new statutory provisions. *See* Opening Br. 26–27.

Because the major questions doctrine applies here, the SEC must "point to clear congressional authorization to regulate" the issue. *West Virginia*, 597 U.S. at 744 (cleaned up). It is never "to be presumed or implied" that "[C]ongress has transferred . . . power to any administrative body." *Interstate Com. Comm'n v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479, 505 (1897). The SEC fails to point to clear congressional authorization here. Instead, it resorts to the same vague language about "rules" "necessary or appropriate in the public interest or for the protection of investors." SEC Br. 58 (quoting 15 U.S.C. § 77g(a)(1), 78*l*(b)(1), 78*l*(b)(1)). To claim, as the SEC does, that this language "*specifically* authorizes" the Rule (SEC Br. 58 (emphasis added)) beggars belief, given that (1) the SEC has rejected similar disclosures in the past as outside its authority, (2) Congress believed that legislation would be needed for similar rules, and (3) the SEC cannot point to any analogous historical disclosures.

Courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia*, 597 U.S. at 723 (cleaned up). The SEC fails to show that Congress clearly provided it the authority to adopt the Rule's sweeping, unprecedented disclosures.

II. The Rule compels speech based on content.

The Rule impermissibly compels speech "based on its communicative content": climate-change. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The SEC has not disputed that the Rule compels speech or that the First Amendment applies. *See* SEC Br. 97. The SEC also does not dispute that corporations are entitled to full First Amendment protections. *See, e.g.*, *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2410 (2024) (Barrett, J., concurring) ("Corporations, which are composed of human beings with First Amendment rights, possess First Amendment rights themselves."). Nor does the SEC dispute that, as a general matter, even "statements of fact" may not be compelled by the government. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

All the SEC disputes is the level of scrutiny. Because the Rule "force[s]" corporations "to confess" their adherence to "orthodox" climate-change views, the Rule is a content-based restriction subject to strict scrutiny. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943);

see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 768–69 (2018) ("*NIFLA*") (rejecting lower scrutiny for such compulsion). The Rule fails that test—SEC never contends otherwise—and would fail even a lesser scrutiny because existing materiality disclosures satisfy any significant government interest in securities disclosures.

A. Strict scrutiny applies.

Contrary to the SEC's argument, the level of speech protection does not change merely because the government has required a corporation to speak in a disclosure form.

Insisting on lesser scrutiny, the SEC first says that the required "communications are commercial speech, or a distinct form of speech akin to it." SEC Br. 99. Whatever that means, it is wrong. To begin, the SEC suggests that as long as the compelled speech shows up in a disclosure form, the speech must be about "economic" rather than political "interests." SEC Br. 97–101. But that gets things backwards. It assumes that all disclosures are the same, and because the SEC requires disclosure, the disclosure must be commercial speech. Precedent requires no such thing. *See NIFLA*, 585 U.S. at 766-69 (explaining that disclosures are not categorically exempt but must pass regular First

Amendment scrutiny). Rather, courts first ask what type of speech is compelled. *See id.* at 766–67 (performing this analysis). Only then can a court determine the appropriate level of scrutiny. *Id.* Courts are not to assume that disclosures must be commercial speech because they are packaged in a disclosure form. *See id.* (rejecting categorical First Amendment exceptions for professional speech). Once the SEC's dice-loading assumption is set aside, its argument falls apart.

Here, the Rule's speech disclosure is unlike material financial disclosures that other circuits have approved. *See* SEC Br. 98–101. Financial disclosures may not always compel controversial and non-factual speech—but, here, the Rule does. To avoid that problem, the SEC asks this Court to play a formalistic name-game: if the SEC labels the speech a financial disclosure, then it must be one. Why? Because it's in an SEC disclosure rule. *See, e.g.*, SEC Br. 97 (asserting that "Commission disclosure rules are generally subject to" "lesser scrutiny"). But "labels cannot be dispositive of degree of First Amendment protection," *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988), and SEC's overarching argument ignores the nature of the compelled speech here.

The SEC's other broad argument is that, because some past disclosures have coexisted with the First Amendment, and the Rule is a disclosure requirement, it must be allowed. *See* SEC Br. 99–100, 111 (citing *Vidal v. Elster*, 602 U.S. 286 (2024)). But *Vidal* does not do the work the SEC needs it to. *Vidal* does not stand as a free-floating exception to the First Amendment for any speech restriction that has existed. As the Supreme Court has explained, its precedents "do not permit . . . content-based restrictions on speech without persuasive evidence . . . of a long" "tradition to that effect." *NIFLA*, 585 U.S. at 767 (cleaned up). Instead, *Vidal* was about a "unique" carve-out for content-based *trademark* restrictions because of the distinct "historical rationales of trademark law." 602 U.S. at 299. The Court considered whether "history and tradition" clearly exempt a specific regulation from the First Amendment's ordinary reach *for trademarks*. *Id.* at 301; *see also id.* at 310 (declining to "set forth a comprehensive framework for judging whether all content-based but viewpoint-neutral *trademark restrictions* are constitutional" (emphasis added)).

The SEC fails to point to clear "historical analogue[s]" to justify the Rule, as the Court required in *Vidal*. *Id.* at 308. With a "cf." signal, the

SEC cites a single source with generalities about an 1844 financial disclosure law in England focused on a "balance sheet." SEC Br. 99–100. That hardly suffices to show that heightened scrutiny never applies when the government labels compelled speech a "financial disclosure." The SEC does not come close to carrying its burden of showing that this regulation falls within one of the "few," "well-defined and narrowly limited classes of speech" with historically permissible restrictions. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 791 (2011) (cleaned up). The SEC cannot even define the class, *see* SEC Br. 99 (arguing that "such communications" might be "commercial speech, or a distinct form of speech akin to it"), much less show a centuries-old tradition of compelling speech on climate change.

Under the SEC's reading of its authority, practically anything could justify financial disclosure because almost anything in the world could present a risk to the bottom line. Consider this scenario. Every four years, a major macroeconomic event occurs: the Presidential election. U.S. Const. art. II, § 1. Under the SEC's reasoning, it could require companies to disclose the risks that a candidate winning an election imposes on its bottom line because that concerns "economic interests." SEC Br. 100. Forcing a corporation to speak about which candidate is better, financially speaking, obviously entails politics and opinion, even if it has coexisting economic ramifications. *See Janus v. AFSCME, Council 31*, 585 U.S. 878, 892 (2018) ("Compelling individuals to mouth support for" political platforms "they find objectionable violates that cardinal constitutional command."). Climate change is no different. The Rule does not compel just commercial speech, because commercial speech (at most) "relate[s] *solely* to the economic interests of the speaker and its audience." SEC Br. 100. These climate disclosures require policy opinions of the speaker *and* are at least partially geared toward the policy interests of the audience.

The SEC's more specific arguments fare no better.

1. *Zauderer* does not apply.

To begin, the SEC argues that the climate compelled speech is factual and non-controversial, so the lower standard from *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626 (1985), applies. SEC Br. 101, 104. But the SEC's *Zauderer* analysis is wrong in two ways. One, it collapses the distinction between "pure[] fact[s]" and opinion that *Zauderer* emphasized. 471 U.S. at 651. Making statements about "climate-related risks" requires statements of opinion that those risks exist, what those risks are, and their magnitude. SEC Br. 101. The SEC admits as much when it says that the Rule requires a company to state "conclusions or inferences based on facts" (SEC Br. 102)—meaning something beyond the "purely factual" disclosures contemplated in *Zauderer*. 471 U.S. at 651. The SEC asserts that "these disclosures do not cease to be purely factual merely because they require issuers to draw a conclusion or inference based on factual information," because disclosure of a "subjective opinion" could be "factual." SEC Br. 102. But the SEC finds no support for this novel expansion of *Zauderer* in this Court's or the Supreme Court's precedents, relying only on a Fifth Circuit decision that relied on a since-vacated circuit precedent. *Id.*; *see Chamber of Com. of United States v. SEC*, 85 F.4th 760, 769 (5th Cir. 2023) (citing *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022), *vacated and remanded sub nom. Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024)).

What's more, the SEC never explains the logical stopping point of its new theory that "conclusions or inferences based on facts" are "purely factual." SEC Br. 102. *Most* opinions can be characterized as "conclusions or inferences based on facts." And trying to get out of First Amendment review by casting the disclosure as a factual retelling of one's own "subjective opinion" fails, too, for disclosure of that "fact" logically compels disclosure of the underlying opinion—whether here or in any other context.

The SEC insists that particular disclosures are purely factual, SEC Br. 101–03, but they are not. One cannot identify "climate-related risks" (SEC Br. 101) absent an underlying view about risks that are climate-related. Whether "an issuer's board or management *does* oversee or play a role in managing material climate-related risks" (SEC Br. 102) equally requires a view on what those risks are and implies a view about the severity (and manageability) of those risks. Same for climate goals and plans. *Id.* Though the SEC insists that disclosure of "severe weather events and other natural conditions" is purely factual (SEC Br. 103), that too is wrong: "[I]n requiring financial statement disclosure of costs associated with severe weather events, the [Rule] proceed[s] from the assumption that all such events are caused by climate change," and "[a]ny issuer that does not share this assumption must state and explain any 'policy decisions' underlying their dissent." Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech*

Under the First Amendment, 101 Neb. L. Rev. 876, 931 (2023). Last, any reports of GHG emissions (SEC Br. 103) will necessarily be heavily influenced by subjective opinions and assumptions *and* depend on an underlying determination of materiality that itself reflects views about climate change.

Second, the SEC's attempt to cast the required disclosures as "uncontroversial" is equally unavailing. The SEC does not dispute that climate change is a "sensitive" and "controversial" "political topic[]." *Janus*, 585 U.S. at 913–14. Instead, it pretends that the disclosures simply require "specific items of information about known or reasonably anticipated risks" and "actions the issuer has already taken." SEC Br. 104. But as explained above, all these disclosures involve the very controversies at the heart of the climate change debate: to what extent climate risks will materialize and affect businesses, how companies should make targets or form action teams to respond, and what science tell us about the issue. None of these disclosures can be made without revealing an opinion on these controversial issues. For instance, whether a company sees fit to have its *board* deal with climate change reveals an opinion about the company's views on the topic. Same for a company's choice to implement a climate goal, and its decision to describe (or not describe) GHG emissions as "material." All these inherently involve taking a position on a controversial public-policy question that is not, unlike the issues in the cases the SEC cites, "settled." *R J Reynolds Tobacco Co. v. FDA*, 96 F.4th 863, 881 (5th Cir. 2024). Climate change, unlike smoking, presents a live political controversy, much like the "topic" of "abortion" does. *NIFLA*, 585 U.S. at 769. Because climate change's causes, effects, and risks are "anything but an uncontroversial topic," lessened scrutiny "has no application here." *Id.* (cleaned up).

2. *Central Hudson* does not apply, either.

According to the SEC, the forced climate-change disclosures are commercial speech, so *Central Hudson* would apply if *Zauderer* doesn't. *See* SEC Br. 100, 111–12. But the SEC never articulates why these disclosures fit within *Central Hudson*'s definition of commercial speech. Indeed, they do not. The speech the Rule compels is more than just "expression related *solely* to" "economic interests." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,* 447 U.S. 557, 561 (1980) (emphasis added). Instead, as shown above, the Rule compels "content based" speech on "the topic" of climate change's alleged causes and risks. *Reed*, 576 U.S. at 163.

As a last resort, the SEC says that the "bounds of" "commercial speech" are undefined, SEC Br. 100, but that half-hearted appeal for a boundless First Amendment interpretation that all corporate speech is commercial speech has already been rejected. *See Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 871 (8th Cir. 2012). So wrapping a government compulsion to speak in the garb of a corporate financial disclosure does not change the essential fact that the government is requiring a person to provide an opinion on a controversial, disputed policy issue.

Thus, strict scrutiny applies— and the SEC never contends that its Rule could pass such scrutiny.

B. The Rule would fail lesser scrutiny.

For the same reasons the Rule fails under strict scrutiny, it also fails under lesser intermediate or exacting scrutiny. Even under that lesser scrutiny, "the restriction must directly advance the state interest involved"—meaning it must provide more than "ineffective or remote support"—and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction[] cannot survive." *Central Hudson*, 447 U.S. at 564. As previously explained, the Rule is far too broad, forcing companies to disclose information that is not purely economic. And the Rule is unduly burdensome and unjustified because it compels political statements that are not reasonably related to helping consumers make informed financial decisions. *See* Opening Br. 56–60.

The SEC does not dispute that it already requires corporations to make material financial disclosures—so the Rule's compelled-speech requirements, to the extent they do anything new, just force companies to take or reveal a policy stance. That is not a legitimate government interest, no matter how much the SEC tries to recharacterize this interest as providing investors with more information. *See Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that the government may not "constitutionally require an individual to participate in the dissemination of an ideological message"). And forcing a corporation to endorse the SEC's preferred message—that alleged climate change risks exist and impact the bottom line—is not a legitimate interest, either. *Id.* at 717 (explaining that where the government's "interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right").

The SEC's claim that the Rule does not "burden" "expressive activity" because it "do[es] not limit issuers' ability to speak" (SEC Br. 110) is hard to understand; as the Supreme Court has explained, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. And it cannot be enough that some investors might "use such information in making investment and voting decisions" (SEC Br. 108–09) because that reason has no logical endpoint and would permit the government to compel all manner of speech that some investors might like to know. "The simple interest in providing [investors] with additional relevant information does not justify a state requirement that a [person] make statements or disclosures she would otherwise omit." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995). "Moreover, given that the rules only help some investors—asset managers—at the expense of investors as a class, it is difficult to see how the investor protection justification can count as compelling or even important for these particular rules." Griffith, *supra*, at 942.

Thus, no matter the level of scrutiny, the Rule violates the First Amendment.

III. The Rule must be vacated.

Last, SEC half-heartedly suggests that the Rule could not be vacated, and that partial vacatur would be enough. The APA says that "[t]he reviewing court shall" "hold unlawful and set aside" unlawful agency action. 5 U.S.C. § 706(2). "Around the time when Congress enacted the APA, the phrase 'set aside'" "meant vacate." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2462 (2024) (Kavanaugh, J., concurring). "The default rule is that vacatur is the appropriate remedy." *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846 (5th Cir. 2022). SEC's arguments—if one could call them that—are unavailing.

First, SEC does not provide enough of an argument on vacatur to avoid waiver. Quoting an opinion concurring in the judgment, the SEC notes that "[t]here are many reasons to think" that the APA does not mean "vacate." SEC Br. 113 (quoting *United States v. Texas*, 599 U.S. 670, 696 (2023) (Gorsuch, J., concurring in the judgment)). SEC does not articulate those reasons or develop this argument further, and even if it were not thereby waived, neither the Supreme Court nor the Eighth Circuit has ever adopted this reading. *E.g.*, *North Dakota v. EPA*, 730 F.3d 750, 764 (8th Cir. 2013) (vacating agency rule).

Next, SEC says "remand without vacatur may be warranted should the Court determine that the Commission did not adequately consider an issue or explain its choices." SEC Br. 113. Again, it is unclear whether this is supposed to be an argument ("may be warranted"), but if so, it's a bad one. First, more explanations cannot remedy a lack of statutory authority. Second, SEC relies on the D.C. Circuit, but that court has explained that "remand without vacatur remains an exceptional remedy." *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020). Though the court has "held that it is appropriate when vacatur would disrupt settled transactions," *id.*, that exceptional circumstance could not apply to a rule that has never taken effect.[1]

Last, SEC argues for severability without identifying the rules (much less "application[s]") that it believes are lawful and could "function

[1] SEC also relies on an Eighth Circuit decision that "set aside the final rule only as to the specific designations contested in this petition," U.S. *Steel Corp. v. EPA*, 649 F.2d 572, 577 (8th Cir. 1981), but that doesn't help SEC either, given that the petitions here challenge the entire Disclosure Rule.

sensibly." SEC Br. 114. And as SEC concedes, all the disclosures in the Rule have a "related purpose[]" (*id.*)—and that purpose, though SEC denies it, is to advance a position on climate change. *Cf. Mayor of Baltimore v. Azar*, 973 F.3d 258, 292 (4th Cir.2020) ("Despite the severability clause, the Final Rule is not severable because it is clear [the agency] intended the [it] to stand or fall as a whole, and the agency desired a single, coherent policy, [with a] predominant purpose." (cleaned up)). Because the Rule is rotten to the core by virtue of its lack of statutory authority, no provisions can be severed, and it must be vacated in its entirety.

CONCLUSION

The Court should vacate the Disclosure Rule.

Respectfully submitted,

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September 17, 2024

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2024, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, and service will be accomplished on all registered counsel by the appellate CM/ECF system.

s/ Jacob Huebert
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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f), it contains 6,470 words.

I certify that this motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

I further certify that this motion has been scanned for viruses and is virus-free.

s/ Jacob Huebert
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September 17, 2024